BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

Neither the opinion of the Court of Appeals (R. 135-139) nor the oral opinion of the District Court (R. 121-122) have been as yet reported.

STATEMENT OF THE CASE.

The facts and the history of the proceedings are fully summarized in the Petition for Certiorari, pages 2-6.

SUMMARY OF ARGUMENT.

I.

The decision interprets Section 7 of the War Labor Disputes Act as providing for the issuance of orders which are unenforceable by either judicial or administrative process, and which are "at most advisory". This interpretation is contrary to that given similar statutes by this Court; it is contrary to the administrative practice of the Board both before and after the passage of the Act; it is contrary to the views about the administration of the Act advanced by the President, the Attorney General, and the Chairman of the Board; it is not supported by the legislative history of the Act; and it has been rejected by a Committee of the Congress which enacted the Act.

II.

Even if Congress intended that orders of the National War Labor Board should be unenforceable, the Board was subject to restraint when it exceeded its jurisdiction or functioned in a manner prohibited by the Act under principles announced by this Court.

III.

Even if Congress intended that orders of the National War Labor Board should be unenforceable, Petitioner's complaint sufficiently stated a case for an injunction against imminent illegal administrative action which would result in irreparable injury. The Court of Appeals adopted the outmoded view that evidentiary facts must be pleaded, and further held, contrary to the previous views of this and other Courts, that express threats of illegal action are a prerequisite to equitable jurisdiction.

IV.

The Court of Appeals further erred in holding that conclusory, *ex parte* affidavits by the Respondents themselves, which denied only the commission of past overt acts and the making of express threats of future overt acts, were sufficient to entitle Respondents to a summary judgment against injunctive relief. Such a holding is contrary to the views expressed by this Court and at least two of the Circuit Courts of Appeals.

V.

Even if the Court of Appeals was correct in holding that Petitioner's complaint did not state a case for injunctive relief, the complaint did state a claim for a declaratory judgment either passing upon the validity of the Board's order or holding it to be merely advisory and hence not binding upon Petitioner. Petitioner's complaint and affidavits showed that the parties had made antagonistic assertions as to their legal rights and obligations, and Respondents' affidavits did not deny this fact. The Court of Appeals apparently assumed that declaratory relief was not available to the Petitioner unless a case for injunctive relief was also stated. This view of the law is opposed to that of this Court and of at least one Circuit Court of Appeals.

ARGUMENT.

I.

The Court of Appeals Erred in Holding That Orders of the National War Labor Board, Issued in Exercise of the Powers Conferred By Section 7 of the War Labor Disputes Act, Are Unenforceable By Either Judicial Or Administrative Process.

The primary ground on which the Court of Appeals based its conclusion that Petitioner's suit should be dismissed was that "the War Labor Disputes Act does not make the Board's order enforceable or reviewable" (R. 137-138), and that Board actions are "at most, advisory" (R. 136, footnote 1).

Of course, if Board orders are enforceable by either judicial or administrative process, they immediately affect legal rights. The present action would then lie, since the courts of the United States may pass upon the validity of administrative actions "to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers." *Stark* v. *Wickard*, 321 U. S....., at p....., 64 S. Ct. (Adv. Sheets) 559 at p. 571.

The Court of Appeals erred in holding orders of the War Labor Board to be merely advisory and entirely unenforceable.

Section 7 of the War Labor Disputes Act evidences a clear intent on the part of Congress to make Board orders legally binding. The Board is empowered, in case of a labor dispute threatening the war effort, to "summon both parties to such dispute before it", to "conduct a public hearing", to "issue subpoenas", and "to pro-

vide by order" the "terms and conditions" which shall "govern relations between the parties", and which "shall be in effect until further order of the Board". Statutory provisions even less detailed have been held by the Court to establish a *quasi-judicial* agency empowered to issue binding orders, because: "We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect"; *Shields* v. *Utah Cent. R. Co.*, 305 U. S. 177 at p. 182.

The majority of the Select Committee to Investigate the Seizure of Montgomery Ward & Company's Property (House Report No. 1904, 78th Congress, 2d Session) reached the same conclusion, saying:

> "Unless this legislation is to be held senseless and useless, the inevitable conclusion is that Congress contemplated and intended the orders of the Board to be enforced after passage of the Act in the same manner and by the same authority as had repeatedly been done before the Act was passed." (Report, p. 22)

The legislative history of the Act supports rather than negatives this conclusion. Before the Act was passed, in *Bethlehem Steel Corp. et al.*, July 16, 1942, 1 War Labor Reports 325, the Board asserted that its orders were "not being adopted voluntarily by the parties" but were "being imposed upon them by the Board". And in *Central States Employers Negotiating Committee*, March 25, 1942, 1 War Labor Reports 77, the Board held that its orders superseded the anti-trust laws. The avowed Congressional intent was to put the Board "on a solid rock of law" (Cong. Rec. 89: 5831), and not to limit, but to strengthen, its powers (Cong. Rec. 89: 5780, 5830, 5831, 5832). Congress certainly did not intend to give the Board a lesser authority than it claimed before Congress acted.

The Board has continued to construe its powers as mandatory. In *J. Greenebaum Tanning Co.*, Aug. 28, 1943, 10

War Labor Reports 527, the Board held that its orders "supplant any legislation of the State of Wisconsin", and that "the employer is compelled to abide not of his own volition". In *Aluminum Co. of America*, Nov. 27, 1943, 13 Labor Relations Reports 418, the Board asserted that it "was created with powers of compulsory arbitration". In *U. S. Vanadium Corp.*, Jan. 21, 1941, 13 War Labor Reports 527, the Board asserted that its orders are obeyed "involuntarily in response to a mandate of a United States Government agency". In *Acme Rubber Mfg. Co.*, Case No. 4197-CS-D, August 22, 1944, the Board asserted that employees "are legally and equitably entitled to their full claim" to retroactive wage payments ordered by the Board, and that such a claim would have "a high preference in law" in case of bankruptcy.

The record in the present case shows: (1) that Board members "have assumed" that orders of the Board "were all enforceable" (R. 130); (2) that the President of the United States has asserted that, when an employer "refuses to comply", his plant "may be seized and operated by the government" or "less drastic sanctions" such as those set forth in Executive Order 9370 may be applied (R. 79-80); and (3) that the Attorney General of the United States has asserted of Board orders that "to enforce them the President has the power to seize" (R. 131).

The Court of Appeals relied primarliy on two decisions under the Transportation Act of 1920: *Pennsylvania Rd. System Federation* v. *Pennsylvania Rd. Co.*, 267 U. S. 203, and *Pennsylvania Rd. Co.* v. *U. S. Railroad Labor Board*, 261 U. S. 72. But those decisions turned on the inclusion of provisions in the Transportation Act "which clearly contemplated the moral force of public opinion as

affording the ultimate sanction": *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515 at p. 545.

The latter decision, together with *Texas & N. O. R. Co.* v. *Brotherhood,* 281 U. S. 548, (both dealing with the Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C., Secs. 151-164), are more closely parallel to the present case than the earlier decisions under the Transportation Act of 1920, and should have been followed by the Court of Appeals.

II.

Even If the Court of Appeals Was Correct in Holding That Orders of the National War Labor Board Are Unenforceable and Merely Advisory, It Erred in Holding That the Board Could Not Be Restrained From Acting Outside Its Statutory Jurisdiction, Or From Failing to Follow the Procedure Specified in the Act.

In *Pennsylvania R. Co.* v. *U. S. Railroad Labor Board,* 261 U. S. 72, this Court held that the Railroad Labor Board, as then instituted, was merely empowered "to give expression to its view of the moral obligation of each side as members of society" (261 U. S. at p. 84), and that, since the Labor Board's decisions, "not being compulsory, violate no legal or equitable right of the complaining company", it was not for the courts "to express any opinion upon the merits of these principles and decisions." (261 U. S. at p. 85).

However, this Court added that: "The Labor Board must comply with the requirements of the statute", and hence did feel called upon to decide, first, whether the Labor Board's proceedings had been instituted by a proper party (261 U. S. at pp. 81-82) and, second, whether the Board had jurisdiction over the type of dispute

involved (261 U. S. at pp. 82-83). Later, in *Pennsylvania R. System Federation No.* 90 v. *Pennsylvania R. Co.*, 267 U. S. 203, this Court expressly held that:

> "Where the Labor Board exceeds its jurisdiction and violates the provisions describing its functions, it may be subject to restraint at the complaint of any properly interested party." (267 U. S. at pp. 215-216)

Petitioner in the present case attacked not only the merits and substance of the order of the National War Labor Board, but charged in addition that the Board had exceeded its jurisdiction and had, by denying a fair hearing, violated the provisions of the Act describing the manner in which it should function.

In holding that Petitioner stated no claim whatsoever, the Court of Appeals decided the case in a way obviously in conflict with the two decisions of this Court construing the Transportation Act of 1920 on which it chiefly relied.

III.

Even If the Court of Appeals Was Correct in Holding That Orders of the National War Labor Board Are Unenforceable and Merely Advisory, It Erred in Holding That the Complaint Failed to Allege in Sufficient Detail a Sufficiently Imminent Threat of Irreparable Injury to Authorize Injunctive Relief.

The Court of Appeals criticized the complaint on these grounds:

> "A plaintiff cannot confer jurisdiction to review even commonplace administrative action by a mere forecast that he will be irreparably injured if the court does not intervene. He must allege facts which support his forecast. * * * Allegations that the Board is about to report plaintiff's non-compliance and that

> the Director is about to issue directives are not statements of fact at all but mere predictions. * * * The complaint does not state the form, substance, time, place, or circumstances of any threat. * * * We understand the complaint to mean not that all 22 of the defendants, or any of them, have made threats, but that the plaintiff considers the situation threatening. The complaint therefore alleges no facts which indicate more than a possibility of any action by the defendants which might cause injury." (R. 138-139)

The allegations of the complaint to the effect that injurious action "is about to" occur, or is "threatened", are allegations of ultimate fact which do not become less than that by describing them as "mere predictions" or as a "mere forecast". They must be supported by evidence before any injunction will issue, but so must all allegations of a pleading.

The criticisms advanced by the Court of Appeals assume that:

1. assertions of ultimate fact about the imminence of injurious action are not good pleading unless specific facts evidencing the ultimate fact are also alleged; and
2. mere imminence of injurious action, when proven, is not sufficient to support an injunction in the absence of express threats.

Both assumptions are erroneous.

A. The allegations of imminent injurious action in the complaint were good pleading under Rule 8 (a) (2) of the Federal Rules of Civil Procedure.

The requirement of Equity Rule 25 that "facts" be pleaded has been superseded by Rule 8 (a) (2) which

requires merely that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief". As a result, "the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted, and a general indication of the type of litigation involved": *Continental Collieries, Inc.* v. *Shober,* (3d cir.) 130 Fed. (2d) 631 at p. 635. Consequently the rules "do not require that a plaintiff shall plead every fact essential to his right to recover": *Sparks* v. *England,* (8th cir.) 113 Fed. (2) 579, at p. 581.

In view of the ample means now provided for probing into the plaintiff's case before trial, a complaint should not be dismissed except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim": *Leimer* v. *State Mut. Life Assur. Co.,* (8th cir.) 108 Fed. (2) 302 at p. 306.

Under these principles, the complaint in the present case was good against the motion to dismiss if an injunction against illegal administrative action may issue on proof either that such action is "threatened" or simply that it "is about to" occur. These allegations gave fair notice to the Respondents of the nature of the Petitioner's claim, even if every fact which would have to be proven before any injunction issued was not averred.

B. Mere imminence of injurious action is sufficient to permit the issuance of an injunction, even in the absence of express threats.

The Petitioner's right to injunctive relief would not be lost simply because Petitioner was unable to prove an overt act already taken by the Respondents, or an express threat already made. Equity possesses the power to act whenever injurious action may be reasonably predicted

even when the defendant claims that the bill discloses only a "mere apprehension that illegal action may be taken": *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65. Express threats have never been held to be necessary to prove an imminence of injury sufficient to support injunctive relief:

> "If threat of injury may only be found in expressions of the defendant, an illiterate mute would be exempt from injunctive orders. Here, as in conspiracy cases and elsewhere, circumstances are the best and sometimes the only obtainable proof. Vaughan's persistent determination to work his will despite the law is proven by an unbroken course of conduct.***"
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> *Vaughan* v. *John C. Winston Co.,* (10th cir.), 83 Fed. (2d) 370.

Petitioner was therefore entitled to an opportunity to prove the imminence of injurious action by evidence of the course of conduct of the Board in other disputes, (including its action in bringing about a prior seizure of Petitioner's property) and by such other evidence of the Board's intention as might be available, whether specifically described in the Complaint or not. Petitioner was not required either to plead or prove an express threat any more than Petitioner was required to plead the evidence to support its "forecast" that injurious action was intended or reasonably imminent.

IV.

The Court of Appeals Erred in Holding That, Under Rule 56 of the Federal Rules of Civil Procedure, Conclusory Affidavits By Moving Parties Merely Denying That Injurious Action Has Been Taken Or "Threatened" Are Sufficient to Support a Summary Judgment in an Action for Injunction.

Rule 56 (c) permits a summary judgment only when the pleadings and affidavits show that "there is no gen-

uine issue as to any material fact". Rule 56 (e) requires that affidavits "be made on personal knowledge" and "set forth such facts as would be admissible in evidence".

The two affidavits filed by the Respondents were insufficient to support the motion for summary judgment for two distinct reasons:

1. they did not negative the allegations of the complaint that the Respondents "are about to" act injuriously to the Petitioners; and
2. they stated conclusions rather than evidentiary facts; in other words, they were couched in the language of a pleading rather than in the language of evidence.

The one evidentiary fact stated in the affidavits was that the War Labor Board had not yet reported Petitioner's non-compliance to Vinson. The assertion in the Garrison affidavit that the Board possessed "no power to enforce such directive order" (R. 87) was clearly a conclusion of law, and in no sense stated facts disproving Petitioner's allegations that injurious actions would nevertheless be taken. To assert a lack of legal right to effect an injury is in no sense a disclaimer of an alleged intention to do so.

The assertion by Vinson that he was "not presently advised as to what action, if any, I would take" (R. 86) does not constitute a denial of the alleged probability that he would act.

The assertion in both affidavits that the Respondents had "neither threatened to take action, nor taken action" is a statement of evidentiary fact only as to the absence of consummated action, and is at best a conclusion as to

whether action was "threatened". Furthermore, it apparently denies only the taking of action and the making of express threats, and hence does not deny the allegation that action "is about to be" taken.

The insufficiency of these affidavits is emphasized by the following principles:

first:

> "All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment."
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> *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, (3rd cir.) 130 Fed. (2d) 1016 at p. 1018.

second:

> "* * * Supporting affidavits and depositions, if any, are carefully scrutinized by the court. * * * Mere conclusions of law or restatements of allegations of the pleadings are not sufficient."
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> *Walling* v. *Fairmont Creamery Co.*, (8th cir.) 139 Fed. (2d) 318 at p. 322.

third: Ex parte affidavits by an interested party covering matters of opinion, or matters which lie chiefly within the knowledge of the affiant, are not sufficient to require summary judgment even in the absence of counter affidavits:

> "This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within his sole knowledge as set forth in affidavits prepared *ex parte*. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth facts which place a very different light upon the picture."
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> *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, (3d cir.) 130 Fed. (2d) 1016 at p. 1022.

"It may well be that the weight of the evidence would be found in trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony."

Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. ..... at p. ....., 64 S. Ct. (Adv. Sheets) 724 at p. 729 (Quoting *Sonnentheil* v. *Christian Moerlein Co.*, 172 U. S. 401 at p. 408: " * * * the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.")

V.

Even If the Court of Appeals Was Right in Holding That the Complaint Failed to Allege a Sufficient Imminence of Irreparable Injury to Support Injunctive Relief, the Court of Appeals Erred in Holding That the Complaint Failed to State a Case for a Declaratory Judgment.

The opinion of the Court of Appeals did not separately discuss the Petitioner's alternative prayer for declaratory relief, apparently believing that its criticisms of the complaint disposed of both aspects of Petitioner's case. The view of the law taken by the Court of Appeals was presumably that, if plaintiff cannot show such an actual or threatened interference with his rights as would support an injunction, he cannot obtain declaratory relief.

This view of the law is at variance with the decision of this Court in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, which expressly asserted (300 U. S. at p. 241):

"Where there is a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be ap-

propriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required".

In *Gully* v. *Interstate Natural Gas Co.*, 82 Fed. (2d) 145 at p. 149, (cited with approval in the *Haworth* opinion, 300 U. S. at p. 244), the Fifth Circuit Court of Appeals said:

> "When, then an actual controversy exists, of which, if coercive relief could be granted and in it the federal courts would have jurisdiction, they may take jurisdiction under this statute of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached [citing authority] * * * Under it disputants as to whose rights there is actual controversy, may obtain a binding judicial declaration as to them, before damage has actually been suffered, and without having to make the showing of irreparable injury and the law's inadequacy required for the granting of ordinary preventive relief in equity."

The present case fully meets the tests laid down in the *Haworth* opinion:

> "There is here a dispute between parties who face each other in adversary proceedings. The dispute relates to legal rights and obligations. * * * The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. * * * Such a dispute is manifestly susceptible of judicial determination."
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> 300 U. S. at p. 242.

The present case, as stated in the complaint and as explained by the affidavits, possesses all the required elements:

first: The parties face each other in adversary proceedings. No collusion exists between Petitioner and Respondents to secure a mutually desired ruling.

second: The dispute relates (1) to the legal right of the National War Labor Board to pass on the immediate labor problem; (2) to the legal right of the Board to proceed as it has proceeded; (3) to the legal right of the Board to provide by order the terms which it has provided; (4) to the legal right of the Board and others to enforce compliance; (5) to the legal right of Respondent Vinson to impose sanctions under executive Order 9370; and (6) to the legal obligation on the part of Petitioner to observe the terms and conditions prescribed by the Board's order. The dispute thus deals with specific legal rights and obligations.

third: The dispute is definite and concrete; it rises out of and relates to a single order of the National War Labor Board. It is not hypothetical, since the order out of which the dispute arises has already been issued. It is not abstract, since it is limited to the rights and obligations arising out of a specific order under a specific set of facts.

fourth: Prior to this suit, the parties had taken adverse positions with respect to their rights and obligations. The Board, in its opinions, had asserted that obedience to its orders was compulsory, and that it was under no obligation to make its orders conform to the provisions of state laws. The Chairman of the Board had asserted that the Board had interpreted the Act as making its orders enforceable through the seizure of the property of noncomplying employers. Respondent Vinson had accepted the responsibility of enforcing an Executive

> Order which had been interpreted by his superior officer, the President, as directing him to impose economic sanctions on non-complying employers. The Petitioner, on the other hand, had asserted that the provisions of the Board's order "do not govern the relations of the parties" (R. 14) and that respondent Vinson "is without legal authority" under Executive Order 9370.

These antagonistic assertions of legal rights and obligations framed a controversy which called for a judicial decision.

The holding of the Court of Appeals that orders of the War Labor Board are not "enforceable" and do not "create legal rights", that the power of seizure does not arise from non-compliance with Board orders, and that Respondents' actions are merely "advisory", do not prove that the case should be dismissed, but instead support Petitioner's case. If the Court of Appeals correctly stated the law, Petitioner was entitled to a judgment declaring the Board's order to be of no force or effect.

So far as Respondent Vinson is concerned, the point made by the Court of Appeals that Executive Order 9370 "neither requires nor authorizes" sanctions "except such as he may deem necessary", does not, if correct, avoid the fact that the complaint called into question Vinson's right to impose sanctions even if he deems them "necessary". On this point at least, Petitioner was entitled to a decision.

The motion for summary judgment of course does not lie as against Petitioner's case for declaratory relief, since nothing in the Respondents' affidavits denied the

making of prior assertions of legal right. The legal conclusion in the Garrison affidavit that the Board "has no power to enforce such directive order", even if good in form, did not deny that the Respondents had claimed that Board orders are enforceable by other agencies of the Government, or that Board orders establish legal obligations to which obedience is legally compulsory.

Respectfully submitted,

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